

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PROVIDENCE ZUMBO, as Administratrix of the
Estate of JOHN ZUMBO a/k/a JOHN D. ZUMBO,

CIV. NO. 07 CV 6340 (LMM)

Plaintiff,

-against-

T. AND B. EQUIPMENT COMPANY, INC.,
ALLEN GEORGE ROTHENBERGER,

Defendants.

-----X

EXHIBIT "E"

TO

**DECLARATION IN SUPPORT OF
PLAINTIFF'S IN LIMINE
MOTION**

1 M. Kelly

2 operations staff, helping them with planning
3 and material acquisition. It's a hard job
4 description because it's a little bit of
5 everything, if that makes any sense.

6 Q. Where is your office located?

7 A. We're at 11065 Leadbetter Road and
8 that's Ashland, Virginia 23005.

9 Q. Does the company have other offices?

10 A. We have storage yards in Orlando,
11 Florida and Goodyear, Arizona. Goodyear is a
12 suburb of Phoenix.

13 Q. When you say storage yards, you mean
14 for trucks or materials?

15 A. Scaffolding equipment. We have a
16 few employees there to load and unload trucks.

17 Q. How many employees at T. and B., do
18 you know?

19 A. Currently we have 210.

20 Q. And how many are located at the
21 Ashland location?

22 A. 150 of them are based out of Ashland.
23 We have work crews all over the country but
24 approximately 150 of them are based out of
25 Ashland. Then the balance is pretty evenly

1 M. Kelly

2 Q. Does he organize the groups of loaders
3 who load and unload the trucks?

4 A. Yes, and the staff that's on-site to
5 set up the equipment. He has a few people under
6 him.

7 Then we have Shannon Sirles who is in
8 charge of our CAD department and systems.

9 Q. C-A-D?

10 A. C-A-D, yes.

11 Q. And what is that?

12 A. Computer aided design. We have to do
13 engineer drawings of the structures we put up.

14 Q. In other words, if you have to set
15 up a set of bleachers at a golf course, you do
16 a computer-generated design?

17 A. Yes.

18 Q. Okay. And is Ms. Sirles in charge
19 of that unit, does she work by herself?

20 A. Shannon is a he.

21 Q. Sorry.

22 A. Easy mistake.

23 Yes, he is in charge of the CAD staff.
24 Currently there are two individuals under him.
25 He's also responsible for information systems,

1 M. Kelly

2 the computer department. I say computer
3 department, it's just him and one other person.

4 Q. Do you have a CPA?

5 A. Yes, I passed the exam but I'm
6 currently not -- my license is not active.

7 Q. Do you have any other certificates --

8 A. No.

9 Q. -- for your job?

10 A. No.

11 Q. Do you have a commercial driver's
12 license?

13 A. No.

14 Q. And have you ever driven for
15 T. and B.?

16 A. No.

17 Q. Any other companies?

18 A. No.

19 Q. Describe for me the trucking unit,
20 if I can describe it like that, of T. and B.

21 A. Okay. We have four road tractors on
22 the road and eight trailers. We use those
23 primarily to shift equipment from one job site
24 to another. I would say 99.9 percent of our
25 shipping is done via common carrier. These

1 M. Kelly

2 trucks are really used to just shift equipment
3 from one job site to another.

4 Q. Who's the common carrier?

5 A. Oh, that's -- there's hundreds of
6 different ones. We go through, we go through
7 brokers and they line up the actual carrier.

8 Q. Now, you use a broker to set up the
9 carrier?

10 A. Yes.

11 Q. So how do you do that, is that on a
12 job-by-job basis?

13 A. As needed.

14 Q. Is there someone who's in charge of
15 making those arrangements with the broker?

16 A. That would be our operations
17 manager, Nathan Hughes.

18 Q. And you mentioned before you have
19 four road tractors. Can you describe what you
20 mean by road tractor?

21 A. Tractor-trailer.

22 Q. Is that just the cab itself?

23 A. Well, the road tractor is the cab
24 unit itself.

25 Q. And then the trailer is the actual

1 M. Kelly

2 flatbed that carries the equipment?

3 A. Yes.

4 Q. And you have eight of those?

5 A. Yes.

6 Q. Are they stored in any one location?

7 A. No, they -- typically there're two
8 in Richmond, one in Florida and one in Phoenix.

9 Q. How many drivers do you have at
10 T. and B., truck drivers?

11 A. CDL drivers there's six.

12 Q. Could you possibly name them?

13 A. Allen Rothenberger obviously, Claude
14 Terrell, let's see, Patrick Myrick, Bob Coe,
15 Bob Mcara, and Bob Mcara is part time, and Lou
16 Wodash.

17 Q. Lou?

18 A. Wodash, W-o-d-a-s-h. Those are the
19 current drivers.

20 Q. Is Mr. Rothenberger the senior most
21 driver of the company?

22 A. No, Claude Terrell would be.

23 Q. Is Allen Rothenberger the next
24 senior most?

25 A. Allen is -- no, he's going to be

1 M. Kelly

2 number three on that list. Bob Coe, actually,
3 I take that back, Bob Coe is senior, Claude is
4 second and then Allen.

5 Q. How long has Bob Coe been there?

6 A. Since January of '02.

7 Q. Mr. Terrell?

8 A. It was sometime in 2003. I don't
9 know the exact date.

10 Q. And Mr. Rothenberger?

11 A. Allen, I don't know his exact date
12 of hire. I'd have to look that up.

13 Q. Has T. and B. always had their own
14 drivers?

15 A. Yes.

16 Q. Has there been a time when their
17 numbers have changed in terms of you now have
18 six, was there a time when you had less than
19 six or more than six?

20 A. Yes, less. This is the most we've
21 ever had.

22 Q. And when was the last time that you
23 had less?

24 A. Let's see, in '06 there were four.
25 I'd say going back to probably 2000 -- pre-2002

1 M. Kelly

2 there were typically just two.

3 Q. Why does T. and B. have their own
4 drivers as opposed to using outside trucking
5 companies?

6 A. There are times, depending on I
7 guess the trucking market, there's some places
8 it's difficult to get a common carrier to go
9 into; and we may have a time sensitive shipment,
10 we'll send one of our own trucks; or, and this
11 is mainly what we use our drivers for, when we
12 have two jobs fairly close together, within 100
13 or 150 miles, it's more beneficial for us to
14 use our own driver to just move that equipment
15 between those two jobs than to hire a common
16 carrier.

17 Q. Now, the full-time truck drivers, do
18 they receive benefits?

19 A. Yes.

20 Q. Health benefits?

21 A. Health insurance, dental and life.

22 Q. Mr. Rothenberger, do you know what
23 his salary is, yearly salary is?

24 A. That will vary because he's paid per
25 mile and then he has part of his compensation

1 M. Kelly

2 Q. Are the individuals you named before
3 on your organizational chart, Mr. Ellis, yourself,
4 Nathan Hughes and Mr. Sirles, are any of them
5 shareholders in the corporation?

6 A. Burke Ellis owns 51 percent of the
7 company. Shannon Sirles' wife who owns
8 49 percent, she's the sister of Burke Ellis.

9 Q. Do you know what the annual revenues
10 for T. and B. are?

11 A. Currently this year \$25 million.

12 Q. Could you describe the actual work
13 that T. and B. does?

14 A. Yes. We provide temporary seating,
15 skyboxes, tent floors and camera towers primarily
16 to sporting events. Approximately three-quarters
17 of our work is done for the professional golf
18 tours.

19 Q. Is it just within the United States
20 or is it --

21 A. Just the U.S.

22 Q. Is there a particular portion of the
23 U.S. or is it the entire domestic area?

24 A. The entire 48 plus Hawaii.

25 Q. Do you go into Mexico at all?

1 M. Kelly

2 A. No, we have not conducted previous
3 employment checks on drivers.

4 Q. Okay. You mentioned before that you
5 were also -- you served in the human resources
6 function?

7 A. Yes.

8 Q. Can you describe what you mean by
9 that.

10 A. In human resources I include I mean
11 benefits administration, I'm the plan
12 administrator on the 401(k) plan, the plan
13 administrator on the health insurance plan,
14 those functions.

15 Q. Does anyone serve as a safety
16 director for the company?

17 A. No.

18 Q. Are you familiar with the Federal
19 Motor Carrier Safety Regulations?

20 A. A little.

21 Q. How did you become familiar with
22 them?

23 A. I'm not sure how to answer this
24 question. Going onto the motor carrier Website
25 to do research if a specific question arose

1 M. Kelly

2 about something. I have not studied the
3 regulations. I do not know the regulations.

4 Q. Does anyone at T. and B. know the
5 regulations?

6 A. Not all of the regulations.

7 Q. Has anyone at T. and B. studied the
8 regulations?

9 A. Not all of the regulations.

10 Q. I'm going to abbreviate Federal
11 Motor Carrier Safety Regulations as FMCSR. If
12 I do so, would you know what I'm talking about?

13 A. Yes.

14 MR. TUCKER: Any objection to that?

15 MR. HORAN: You mean in your
16 questions?

17 MR. TUCKER: In my questions.

18 MR. HORAN: No.

19 Q. Are you aware that the purpose of
20 the FMCSR is to promote safety of operations on
21 the nation's highways for the general driving
22 public?

23 A. Yes.

24 Q. Was there any safety training provided
25 to Mr. Rothenberger when he became employed

1 M. Kelly

2 with T. and B.?

3 A. There is a training brochure for
4 flatbed haulers that our drivers are given and
5 they're asked to read and there's a page in
6 front of the booklet saying that I read and
7 understand these regulations and procedures.

8 THE WITNESS: I sent that booklet up.

9 MR. HORAN: Thank you.

10 (Kelly Exhibit 1, Booklet, marked
11 for identification, as of this date.)

12 Q. Mr. Kelly, I've handed you a document
13 we've marked as Kelly 1. Do you recognize that
14 document?

15 A. Yes.

16 Q. And what is that document?

17 A. That is the book that I just spoke
18 of that I asked the drivers to read and
19 understand about hauling flatbed loads.

20 Q. Are you familiar with this booklet?

21 A. A little. I have not read it.

22 Q. Okay. Do you need a moment to take
23 a look through it before I ask you some
24 questions about it?

25 A. Well, let's just -- let's ask the

1 M. Kelly

2 questions.

3 Q. Okay. Is this the entirety of any
4 safety manual provided to Mr. Rothenberger
5 subsequent to his employment with T. and B.?

6 A. No, there is an employee handbook
7 that addresses driving that he would have
8 received at the time of hire.

9 Q. I'm going to hand you a document
10 that has been marked as Plaintiff's 1. Is that
11 the employees handbook?

12 A. There's an older version that I'm
13 thinking of and not this particular document.

14 Q. Does T. and B. still have that older
15 version --

16 A. Yes.

17 Q. -- in its custody and control?

18 A. Yes.

19 MR. TUCKER: Okay. I'd ask for
20 production of that, John.

21 MR. HORAN: No problem.

22 MR. TUCKER: And I'll put it in
23 writing for you also.

24 MR. HORAN: No problem. I don't
25 want to -- yes, please follow it up in

1 M. Kelly

2 writing and that should be no problem if
3 he has it.

4 Q. The older version, how is it
5 different than this version?

6 MR. HORAN: If you know without
7 looking at the other one.

8 A. It's basically the same. I know
9 that it does address operating company vehicles.
10 It's basic, they're to be used for company
11 business only, there's to be no alcohol or drug
12 abuse while operating a vehicle. It's a very
13 basic document.

14 Q. Does it address the requirements
15 under the FMCSR?

16 A. No.

17 Q. Who developed that booklet, do you
18 know?

19 A. I don't know who wrote it. It was
20 before my time.

21 Q. Do you know who developed the
22 document which I've showed you Plaintiff's
23 Exhibit 1?

24 A. This one is basically excerpts from
25 the document I speak of and then Nathan Hughes,

M. Kelly

our operations manager, wrote that.

Q. So there is no safety plan at T. and B. for the drivers?

A. No formal safety plan.

Q. What efforts has the company made in relation to safety instructions for the drivers at T. and B.?

MR. HORAN: At what time?

MR. TUCKER: Let's say at the time that Mr. Rothenberger was hired up to and about July of 2006.

MR. HORAN: I'm sorry, could I have the question read back.

(Record read.)

MR. HORAN: Just note my objection. Could you just clarify what do you mean by efforts made.

MR. TUCKER: Okay.

Q. Has the company provided any classes for any of the drivers --

A. No.

Q. -- during that period of time?

A. No.

Q. Did the company hire any outside

1 M. Kelly

2 safety consultants to speak with the drivers?

3 A. No.

4 Q. Did the company send the drivers to
5 any classes outside of T. and B. for safety
6 instructions?

7 A. No.

8 Q. Did the company send any of the
9 drivers on accident prevention workshops?

10 A. No.

11 Q. Did the company provide any accident
12 prevention workshops?

13 A. No.

14 Q. With regard to the drivers, what
15 industry standards did the company adopt?

16 A. I'm sorry, say that last part again.

17 Q. Are you familiar with the industry
18 standards as they relate to commercial driving,
19 commercial drivers?

20 A. No.

21 Q. Does anyone at T. and B. know what
22 they are?

23 MR. HORAN: If you know.

24 A. I'd have to answer no, I don't know.

25 Q. Does T. and B. offer any incentives

1 M. Kelly

2 or bonuses to promote safe driving habits?

3 A. No.

4 Q. Has anyone at the company ever done
5 any research into safety programs outside the
6 company for the drivers?

7 A. Yes.

8 Q. Who was that?

9 A. That would be me.

10 Q. And when did you do that?

11 A. In the last 12 months.

12 Q. That's subsequent to the accident
13 with Mr. Zumbo?

14 A. Yes.

15 Q. But prior to that you've never --

16 A. No.

17 Q. Let me finish the question.

18 A. Sorry.

19 Q. Prior to that you never researched
20 any safety programs for the drivers?

21 A. No.

22 Q. And did anyone at T. and B. do that
23 prior to the accident?

24 A. I don't know.

25 MR. HORAN: Just note my objection

1 M. Kelly

2 to any questions about procedures subsequent
3 to the accident.

4 MR. TUCKER: Yes, that's really
5 informational stuff. The objection is for
6 trial, I understand that.

7 MR. HORAN: That's why I didn't tell
8 him not to answer.

9 MR. TUCKER: Yes, good. Thanks.

10 Q. The drivers, the commercial drivers
11 that drive for T. and B. prior to the accident,
12 were they screened by anyone at T. and B.?

13 MR. HORAN: What do you mean by
14 screened?

15 Q. Were they screened for drug and
16 alcohol use?

17 A. No.

18 Q. Were they ever asked if they abused
19 alcohol?

20 A. I don't know if that question was
21 asked.

22 Q. Do you know if they were ever asked
23 if they abused drugs?

24 A. I don't know if that question was
25 ever asked.

M. Kelly

Q. Did anyone at T. and B. ever take any efforts to verify whether or not someone was regularly using alcohol, CDL driver?

A. I don't know.

Q. But you were in charge of human resources at the time?

A. Yes, so to speak.

Q. So you would be the person who would know, right?

A. Yes.

MR. HORAN: Objection.

Q. And you don't know as you sit here?

A. I don't know if anyone asked that question.

Q. Does T. and B. have any suggestion boxes about potential safety problems for drivers?

A. No.

Q. Do you ever conduct any interviews with the drivers regarding any safety issues?

A. Yes.

Q. And when was that?

A. It's at various times.

Q. Prior to the accident?

1 M. Kelly

2 A. Yes.

3 Q. Okay. Can you describe them?

4 A. If, for example, if there was an
5 incident, maybe a piece of equipment fell off
6 the truck while it was going down the highway,
7 a strap will break from time to time, we'll ask
8 the driver what happened, why did that strap
9 break, was it damaged beforehand, trying to get
10 to the bottom of that, making sure that the
11 damaged strap has been disposed of and replaced
12 with a new one, that kind of thing.

13 Q. Okay. So most of those interviews
14 occurred after something occurred?

15 A. Yes.

16 Q. Did you ever sit down on a regular
17 basis and ask truckers what their concerns
18 might be with regard to safety?

19 A. I have not.

20 Q. Anybody at T. and B., to your
21 knowledge?

22 A. I do not know the answer to that.

23 Q. Was there an accident procedure in
24 place at T. and B. on the date of and before
25 the accident in question July of 2006?

1 M. Kelly

2 A. Yes.

3 Q. And what was that procedure?

4 A. Once an incident occurred, and this
5 would typically be myself or Nathan Hughes,
6 would contact the persons involved, take down
7 the details of the accident, if there were a
8 police report issued, insurance information
9 from another party if another party was
10 involved, gathering that information.

11 If it was something that needed to
12 be reported to our insurance carrier, that
13 information was reported by myself to the
14 insurance carrier.

15 Q. And is that the sum total of the
16 review conducted by T. and B. after an
17 accident?

18 A. Part of that process is to speak
19 with the parties involved trying to find out
20 why the accident or incident occurred and what
21 could have been done to prevent it, if anything.

22 Q. So Nathan Hughes would be one person
23 that would sit down with the driver?

24 A. Yes.

25 Q. And how long would a typical interview

1 M. Kelly

2 be with Mr. Hughes following an accident?

3 A. That would be a pretty short period
4 of time.

5 Q. What do you mean by short?

6 A. Ten, 15 minutes.

7 Q. Between January of 2005 and July
8 of 2006, do you know how many accidents the
9 company trucks were involved in?

10 MR. HORAN: What do you mean by
11 accident?

12 MR. TUCKER: Any kind of accident,
13 whether it be a minor accident or a fatal
14 accident.

15 MR. HORAN: Involving another vehicle?

16 MR. TUCKER: Yes.

17 A. One. This one.

18 Q. So is this the first time during that
19 period of time that Nathan Hughes had to sit
20 down with any driver to discuss what happened
21 with the accident?

22 A. Over that course of time I'm sure
23 there were a couple of instances where a piece
24 of equipment may have come off a truck. There
25 may have been --

1 M. Kelly

2 I can remember one specific incident
3 early in '07 -- I'm sorry, '06, where a motorist
4 called us who was traveling up the New Jersey
5 Turnpike and reported to us that something just
6 fell off of one of our trucks.

7 I immediately got the driver on the
8 phone. At that time he had pulled over because
9 the motorist had flagged him down.

10 That's the only incident that comes
11 to mind right now and there was no property
12 damage or injury involved in that.

13 Q. Was there any reason that prior to
14 July of 2006 T. and B. did not have a safety
15 director?

16 A. I can't give you a reason.

17 Q. In 2006, can you tell me what
18 T. And B.'s annual revenue was?

19 A. Approximately 17 million. I would
20 need to go back to my records to verify.

21 Q. How about 2005?

22 A. Maybe 13. I'd have to go back and
23 look at numbers to give you exact numbers.

24 Q. Okay.

25 MR. HORAN: He just wants an

1 M. Kelly

2 estimate at this point I think.

3 A. I think that's about correct.

4 Q. And you mentioned before that at
5 present it's approximately 25 million?

6 A. Yes.

7 Q. Was there any reason back in 2006
8 that T. and B. did not hire outside safety
9 consultants to instruct the drivers?

10 A. No.

11 Q. Was there any reason why in 2006
12 T. and B. didn't provide drivers with
13 instructions regarding the FMCSR?

14 A. No.

15 Q. Was there any reason why back in
16 2006 T. and B. did not provide its truck
17 drivers with any other safety manuals outside
18 of the documents that have been marked as
19 Plaintiff's 1 and Kelly 1?

20 A. No.

21 Q. And when I say Plaintiff's 1, I
22 refer to the --

23 A. That other document.

24 Q. The other document.

25 A. I understand.

1 M. Kelly

2 Q. What is the reason that in the year
3 2006 T. and B. didn't provide any safety
4 instructions to its drivers?

5 A. We are a small company. The owner
6 of the -- the previous owner of the company had
7 just unexpectedly died. Things were a little
8 topsy-turvy. His son, Burke Ellis, had just
9 taken over as president. It's a new role for
10 him.

11 I do not have an answer to your
12 question.

13 Q. In 2005, who was the president of
14 the company?

15 A. That was Burke Ellis.

16 Q. I'm sorry, is that the son or the
17 father?

18 A. That's the son. The father passed
19 away in late '02.

20 MR. HORAN: They had the same name?

21 THE WITNESS: Yes, junior and senior.

22 Q. So that Burke Ellis, Junior took over
23 in 2002?

24 A. Yes.

25 Q. And he was president in 2003?

1 M. Kelly

2 A. Yes.

3 Q. And he was president in 2004?

4 A. Yes.

5 Q. And he was president in 2005?

6 A. Yes.

7 Q. And he was president in 2006?

8 A. Yes, sir.

9 Q. Did he have any safety plan in
10 effect any of those years I just mentioned.

11 A. No.

12 Q. Were there any safety consultants
13 hired to instruct the drivers during any of
14 those years I just mentioned?

15 A. To my knowledge, no.

16 Q. Was there any safety director at
17 T. and B. during those years that we just
18 mentioned?

19 A. No.

20 Q. Is the main office for T. and B. in
21 Virginia?

22 A. Yes.

23 Q. I'm going to hand you two documents
24 that have been perviously marked as Plaintiff's
25 Exhibit 3 and Plaintiff's Exhibit 4 and tell me

1 M. Kelly
2 if you recognize these documents.

3 A. Yes.

4 Q. Okay. What do you recognize those
5 documents to be?

6 A. These appear to be logbooks that
7 Allen Rothenberger completed, one in April, one
8 in June.

9 Q. And are those logbooks records kept
10 in the regular course of business of T. and B.?

11 A. Yes.

12 Q. And they're kept by the drivers --

13 A. Yes.

14 Q. -- the truck drivers?

15 A. Yes.

16 MR. HORAN: Well, kept, what do you
17 mean kept?

18 Q. Are they maintained by the driver?

19 A. The driver completes the form and
20 then sends them in to the office.

21 Q. Okay. If we can look at Plaintiff's
22 Exhibit 3, for instance, the first page --
23 actually, each of the pages afterwards is a
24 similar copy of the driver's log just for a
25 different day, correct?

1 M. Kelly

2 A. Appears to be just different days,
3 yes.

4 Q. So if we can just go over this. The
5 first day in Plaintiff's 3 on the first page is
6 April 7, 2006?

7 A. Yes.

8 Q. Okay. And in the upper left-hand
9 corner there's a number 175; do you see that?

10 A. Yes.

11 Q. And what is that?

12 A. That would be the truck number.

13 Q. Okay. The total miles driving today
14 is not filled out; is that fair to say?

15 A. He didn't total it. He has his trip
16 detail here by state and miles broken down by
17 state.

18 Q. So that's in the lower left-hand
19 corner?

20 A. Yes.

21 Q. So is that under the quadrant named
22 miles driven today by states?

23 A. Yes.

24 Q. And, for instance, it says the state
25 Virginia --

1 M. Kelly

2 A. Yes.

3 Q. -- it says empty?

4 A. Yes.

5 Q. And it looks like there's a number
6 there, I can't make it out, maybe 10?

7 A. That would be impossible. That number
8 should -- that should be 100.

9 Q. Okay.

10 A. Our office is located approximately
11 100 miles north of the North Carolina line.

12 Q. So then if you go to the next line,
13 it says NC for North Carolina?

14 A. Yes.

15 Q. And it says empty 183?

16 A. Yes.

17 Q. So he was driving an empty trailer;
18 is that what that refers to?

19 A. It appears from this logbook he was
20 taking an empty trailer to our Florida yard.

21 Q. Okay. If you look up on the top
22 half of the page, there's a graph.

23 A. Bar graph.

24 Q. There's a bar graph which indicates
25 several things that the driver has to keep a

1 M. Kelly

2 record of. The hours that he's off duty?

3 A. Uh-huh.

4 Q. The time that he or she is in the
5 sleeper berth?

6 A. Uh-huh.

7 Q. The time that they're driving and
8 the time that they're on duty, correct?

9 A. Correct.

10 Q. And they do that by charting the
11 number of hours along the bar graph?

12 A. Yes, and these are in 15-minute
13 increments.

14 Q. Now, the total's kept in far right
15 column under total hours, do you see that?

16 A. Uh-huh.

17 Q. Why does the driver fill out this
18 driver's daily log?

19 A. He has certain hour requirements
20 that he has to maintain.

21 Q. Is that company requirements?

22 A. That is federal, federal requirement.

23 Q. Under what statute, do you know?

24 A. I do not know the section, specific
25 section offhand.

1 M. Kelly

2 Q. Is that under the Federal Motor
3 Carrier Safety Regulations?

4 A. It's within those regulations, yes.

5 Q. Why does the company follow that
6 requirement with regard to driver's daily log
7 and not any other requirements that we
8 discussed under the FMCSR?

9 MR. HORAN: Note my objection to
10 that question.

11 You can answer it.

12 A. To prevent fatigue. They have a
13 certain amount of hours that they are allowed
14 to work or drive in a given 24-hour period and
15 it's done to monitor that.

16 Q. How does T. and B. know that the
17 Federal Government requires them to keep these
18 logs?

19 A. It's within the regulations. I've
20 seen that section, the hours of service
21 requirements.

22 Q. You've seen that section but you
23 haven't looked at other sections with regard to
24 safety?

25 A. No, sir.

1 M. Kelly

2 Q. And I guess my question is, why does
3 the company comply with that one section when
4 it comes to driver's daily log?

5 MR. HORAN: I think he already
6 answered it.

7 A. To try to monitor their activity to
8 make sure that they are fit for duty.

9 Q. Is that important to T. and B.?

10 A. Very.

11 Q. Why?

12 A. I think that's obvious.

13 Q. Not to me. I need you to answer it.

14 A. Okay. I'm sorry.

15 MR. HORAN: Don't be sorry. It's
16 okay. Answer his question. It's okay,
17 you're doing fine.

18 Q. You're doing very well.

19 A. To hopefully avoid situations like
20 this particular situation.

21 Q. So it's important for T. and B. to
22 have their drivers fresh and awake when they're
23 driving?

24 A. Yes, very.

25 Q. If a driver was driving for too long

1 M. Kelly

2 a period of time, a driver can possibly get
3 overtired, correct?

4 A. Yes.

5 Q. And if a driver is overtired, it
6 could cause them to lose their reactive --
7 withdrawn.

8 If a driver is overtired, it could
9 cause accidents, correct?

10 MR. HORAN: Note my objection.

11 You can answer it.

12 A. Yes, I would agree with that.

13 Q. And T. and B. is concerned about
14 accidents?

15 A. Yes.

16 Q. Does the Federal Government require
17 you to produce these logs to them?

18 A. If a driver --

19 MR. HORAN: Yes or no.

20 A. Yes.

21 Q. And how is that done?

22 A. Through DOT inspections along the
23 highway.

24 Q. So in other words, while a truck
25 driver is driving, he could be pulled over to a

1 M. Kelly

2 DOT inspection station?

3 A. Yes.

4 Q. And if he's at that inspection
5 station, he'd have to produce these logs?

6 A. Yes.

7 Q. And if he does not have these logs,
8 he'll be issued a ticket or summons, correct?

9 A. Yes.

10 Q. And the company has to pay that?

11 A. The driver will pay that.

12 Q. That comes out of the driver's pay?

13 A. Yes.

14 Q. Okay. Does anyone at T. and B. oversee
15 the driver's daily logs?

16 A. Yes.

17 Q. Who is that?

18 A. Ultimately me.

19 MR. HORAN: I'm sorry, what did you
20 say?

21 THE WITNESS: Me.

22 Q. In 2006, how did you do that?

23 A. Drivers will send in their logs via
24 Federal Express or UPS periodically, typically
25 every two weeks, to the office.

1 M. Kelly

2 Q. Are they provided with UPS envelopes?

3 A. Yes.

4 Q. So while they're on the road they'll
5 have to mail in these?

6 A. Yes.

7 Q. And where do they make copies, do
8 you know?

9 A. Most all of their logbook should be
10 a -- is a two-piece carbon form and we get the
11 red copy, which is the original.

12 Q. What do you do once you receive the
13 red copy of a driver's log?

14 A. I have someone compile this miles
15 driven by states for fuel tax reporting purposes.

16 Q. Somebody in your office?

17 A. Yes.

18 Q. For what purpose, I'm sorry?

19 A. Fuel tax reporting.

20 Q. For any other reason you do that?

21 A. That's the only reason for this data
22 down here.

23 Q. What else do you do with these daily
24 logs once you receive it?

25 A. Their hours of service are compiled

1 M. Kelly

2 into a spreadsheet.

3 Q. By who?

4 A. Usually the receptionist.

5 Q. And who looks at that spreadsheet
6 once it's compiled?

7 A. I do.

8 Q. And what do you look for?

9 A. I try to scan it periodically to
10 make sure that they are within the guideline
11 for hours of service.

12 Q. And what are the hours of service
13 under the federal guidelines that a trucker is
14 allowed to drive?

15 A. I could not quote you that regulation.
16 There's a plastic card that all of our drivers
17 have that has that printed on it.

18 There's a 70 hour within six days
19 rule and an 80 hour within seven day rule and
20 then I think it's 11 hours of drive time in a
21 24-hour period. I'm not certain of that rule.
22 I would need my reference.

23 Q. Is it fair to say that what you do
24 is you have someone in your office compile the
25 hours that we just spoke about on a spreadsheet?

1 M. Kelly

2 A. Uh-huh.

3 Q. Yes or no?

4 A. Yes.

5 Q. Just for the record.

6 A. Sorry.

7 Q. That's okay.

8 And then you take those hours, you
9 or someone that works for you, and compare it
10 to a formula?

11 A. Yes.

12 Q. Okay. And that formula is consistent
13 with the guidelines set by the Federal
14 Government?

15 A. Yes.

16 Q. What happens if someone goes outside
17 of that formula?

18 A. When I've seen that, I've spoken to
19 our operations staff, Nathan Hughes in
20 particular, and said you need to watch your
21 drivers, we've got issues with hours of service.

22 Q. If a driver goes outside the hours
23 of service mandated by the federal guidelines,
24 would the company be subject to any potential
25 fines or violations?

1 M. Kelly

2 A. Yes.

3 Q. Can you describe for me what that is.

4 A. The Department of Transportation, if
5 we were in an audit situation and they came in
6 and reviewed our books and records as they
7 relate to drivers and found these type of
8 violations and did not see any documented
9 disciplinary action, they could potentially
10 fine us.

11 Q. So when you say documented
12 disciplinary action, what kind of disciplinary
13 action would that be?

14 A. Written notice in -- written
15 documentation of counseling the driver that you
16 are exceeding your hours of service on these
17 days.

18 Q. Prior to 2006, from the time that
19 you started with the company until July of
20 2006, had you had to sit down with a driver and
21 document --

22 A. No, not me personally.

23 MR. HORAN: Listen --

24 Q. Let me finish the question.

25 MR. HORAN: Let him finish.

1 M. Kelly

2 Just clarify.

3 Q. The question is, have you had to sit
4 down with a driver and document any driver
5 going outside the federal requirements for
6 driving guidelines?

7 A. No, I have not.

8 Q. Do you know if anybody at T. and B.
9 had to during that period of time?

10 A. I do not know.

11 Q. Okay.

12 When you do a written disciplinary,
13 when you take written disciplinary action,
14 where does that go, does it go into his
15 personnel folder?

16 A. Yes.

17 Q. Where are the drivers' personnel
18 folders kept?

19 A. They are kept by my payroll manager
20 in her office.

21 Q. And that payroll manager reports
22 directly to you?

23 A. Yes.

24 Q. Was that the same situation in 2006?

25 A. Yes.

1 M. Kelly

2 Q. Okay. Now, tell me what's inside of
3 a typical driver's personnel folder.

4 A. Their initial application, a copy of
5 their DOT issued -- well, approved medical
6 card, and if there were any, if there were any
7 disciplinary action, those documents would be
8 in there, as well as I-9 form, copies of
9 identification.

10 Q. What's an I-9 form?

11 A. That's the immigration form to
12 basically prove you have the right to be in
13 this country and work.

14 (Kelly Exhibit 2, Document, marked
15 for identification, as of this date.)

16 Q. I've handed you what's been marked
17 as Kelly 2. Do you recognize this document,
18 Mr. Kelly?

19 A. I don't believe I've seen this
20 before.

21 Q. Are you familiar with the driver's
22 license and identification application, driver's
23 license and identification card application for
24 commercial driver Allen Rothenberger?

25 A. No, I'm not. I've never seen this

1 M. Kelly

2 particular item before.

3 Q. Okay. Do you know what year
4 Mr. Rothenberger obtained his commercial
5 driver's license?

6 A. I'd have to go back and look at a
7 copy of the date issue on his license.

8 Q. Okay. This document was obtained by
9 us through a Freedom of Information Law request
10 actually just recently, and if you look at the
11 top of the driver's license, it says application
12 for driver's license that's checked; do you see
13 that?

14 A. Yes.

15 Q. Okay. And if you come down a little
16 further, it's Allen Rothenberger?

17 A. Yes.

18 Q. And if you read the question where
19 it says driver license applicants complete the
20 following, do you see that?

21 A. Yes.

22 Q. And if you take a look at question
23 number 5, have you been convicted within the
24 past ten years in this state or elsewhere of
25 any offence resulting from your operation of or

1 M. Kelly

2 involving a motor vehicle, do you see that?

3 A. Yes.

4 Q. What did he check, yes or no?

5 A. He's checked the no box.

6 Q. If you turn to the second page of
7 this application, can you tell me what date --
8 first of all, do you recognize Mr. Rothenberger's
9 signature on the bottom of that page?

10 A. Yes, that looks like his based off
11 of the logbooks.

12 Q. Right, that's consistent with what's
13 in Plaintiff's 3 and 4?

14 A. Uh-huh.

15 Q. What date did he sign that?

16 A. That appears to state 8/17, it looks
17 like '05.

18 (Kelly Exhibit 3, Driver history
19 record, marked for identification, as of
20 this date.)

21 Q. Okay. I hand you what's been marked
22 as Kelly 3. What I've handed you is a Virginia
23 Department of Motor Vehicles transcript of a
24 driver history record as of June 17th, 2008; do
25 you see that?

1 M. Kelly

2 A. Yes.

3 Q. Have you ever obtained a copy of a
4 driver history record for any of the drivers at
5 T. and B. while you were working there?

6 A. No.

7 Q. Do you know how to obtain such a
8 driver transcript record?

9 A. There is a form that I can get the
10 individual to sign giving me permission to do
11 that.

12 Q. Why have you never done that?

13 A. I don't know.

14 Q. If you look at the top of the page,
15 it says requested for Kurzman, Karelsen & Frank;
16 do you see that?

17 A. Uh-huh.

18 Q. That's the name of my firm.

19 A. Right.

20 Q. Okay. And if you come down, it's
21 information provided by request of Allen George
22 Rothenberger; do you see that?

23 Is that the driver who works for
24 your company?

25 A. Yes.

1 M. Kelly

2 Q. If you look down at page 3, you'll
3 see on the last page it says convicted on
4 January 22nd, 1998 of driving while intoxicated
5 first degree?

6 A. Uh-huh.

7 Q. The offense date was 12/13/97; do
8 you see that?

9 A. Yes.

10 Q. Did you know prior -- did you know
11 when Mr. Rothenberger was hired that he had
12 been previously convicted of driving while
13 intoxicated?

14 A. No, I did not.

15 Q. Did you know that Mr. Rothenberger
16 was convicted twice of driving while intoxicated?

17 A. No, I did not know that.

18 Q. Did you know that he was convicted
19 of drunk and disorderly more than ten years
20 prior to employment with you?

21 A. No, I did not know that.

22 Q. If you do the math, 1998 to 2005, is
23 that within ten years?

24 A. Yes.

25 Q. Are you aware as you sit here today

1 M. Kelly

2 that Mr. Rothenberger lied on his driver's
3 application for his commercial driver's
4 license?

5 MR. HORAN: Note my objection to the
6 form of the question.

7 You can answer it. You can answer
8 it.

9 A. Given this information, yes, it
10 would appear that he did.

11 Q. Had you done any investigation to
12 find out if Mr. Rothenberger had been truthful
13 in his application for his commercial driver's
14 license?

15 A. No.

16 Q. Had you done any investigation on
17 any of your drivers to determine whether or not
18 they were truthful in their application in
19 obtaining their commercial driver's license?

20 A. No.

21 Q. Do you think it's important to have
22 done so?

23 A. Yes.

24 Q. Why didn't you do so?

25 A. I don't have an answer for you.

1 M. Kelly

2 Q. If you look at Kelly 3 --

3 A. Yes.

4 Q. -- if you look at page 3 and you
5 look at the first paragraph on that page of
6 Mr. Rothenberger's history record, it says
7 convicted on July 13th, 2005 of operating an
8 uninsured vehicle; do you see that?

9 A. It says uninspected.

10 Q. Uninspected, I apologize. Uninspected
11 vehicle, do you see that?

12 A. Yes.

13 Q. Were you familiar that he was
14 convicted of that offense?

15 A. No, I was not aware of it.

16 Q. Was that done while he was employed
17 with T. and B.?

18 A. I'd have to go look at his --

19 MR. HORAN: Excuse me, I'm sorry.

20 Objection. Do you mean a T. and B.
21 vehicle?

22 MR. TUCKER: Well, I want to know
23 first if it happened while he was employed
24 with them and if --

25 MR. HORAN: Okay.

1 M. Kelly

2 your recollection about whether or not he was
3 driving for T. and B. in July of 2005?

4 A. Yes, I'm pretty sure of that.

5 Q. Okay. If Mr. Rothenberger had been
6 convicted in July of 2005 for operating an
7 uninspected vehicle, would you have known about
8 that?

9 A. If it were one of our vehicles, I
10 should have known.

11 Q. If you look down in that paragraph
12 on the third page, it says commercial vehicle;
13 do you see that?

14 A. Yes.

15 Q. Do you know if he was driving any
16 other commercial vehicles during that period of
17 time other than a T. and B. vehicle?

18 A. I do not know.

19 Q. Between the time that Mr. Rothenberger
20 was hired and July of 2006, did anyone at
21 T. and B. take any steps to verify whether or
22 not he had committed any traffic offenses while
23 driving a T. and B. vehicle?

24 A. To my knowledge, no.

25 Q. Did you have any procedure in place

1 M. Kelly

2 to do any checking on the drivers to make sure
3 that they were complying with all the rules and
4 regulations?

5 A. No.

6 Q. If you turn to page 2 of that
7 document --

8 A. This one?

9 Q. Kelly 3.

10 A. Okay.

11 Q. You'll see on the bottom it says
12 convicted on 6/19/06 --

13 A. Uh-huh.

14 Q. -- of operating an uninspected
15 vehicle; do you see that?

16 A. Yes.

17 Q. And the offense date for that was
18 May 31st, 2006; do you see that?

19 A. Wait. I'm sorry, I'm looking at the
20 wrong section.

21 Okay, 6/19. Okay, I got you.

22 Q. And you see the offense date was May
23 31st, 2006?

24 A. Yes.

25 Q. He was employed with your company at

M. Kelly

that time?

A. Yes, he was.

Q. Are you aware that he was convicted of this offense?

A. No, I was not.

Q. Is this the first time you've become aware of this?

A. Yes.

Q. If you look at the next line below that, it says suspension issued on July 11, 2006?

A. Uh-huh.

Q. And it's effective from July 4th, '06; do you see that?

A. Yes.

Q. Do you know what that refers to?

A. It looks like he didn't pay a ticket.

Q. And if you see the conviction, the conviction date is the same for the one above for operating the uninspected vehicle in June 19, 2006; do you see that?

A. Yes.

Q. Do you know if his license was suspended?

A. I was not aware of this.

1 M. Kelly

2 Q. Okay. And are you aware of the date
3 of the accident here?

4 A. 7/7/06.

5 Q. Do you know if his license was
6 suspended at the time that he was involved in
7 this accident?

8 A. No, I did not know that.

9 MR. TUCKER: And while I'll concede,
10 John, that the next one I'm going to ask
11 about is after the accident date, I just
12 want it for informational purposes.

13 MR. HORAN: Okay. Thank you.
14 I'll just have a running objection to
15 anything post accident.

16 MR. TUCKER: That's fine.

17 Q. And you can answer the questions.
18 Just it's a technical issue that if I ask you
19 questions after the accident, it's something
20 that he can object to me bringing in at trial
21 but I'm entitled to inquire about it in
22 discovery, which we're doing now.

23 A. Okay.

24 Q. If you look above, you'll see on
25 August 16, 2007 Mr. Rothenberger was convicted

1 M. Kelly

2 A F T E R N O O N S E S S I O N :

3 (12:52 p.m.)

4 M I C H A E L A L L E N K E L L Y ,

5 previously sworn, resumed:

6 EXAMINATION CONTINUED BY MR. TUCKER:

7 Q. Good afternoon, Mr. Kelly. We're
8 back on the deposition. You understand you're
9 still under oath?

10 A. Yes.

11 Q. Do you have any questions before we
12 begin?

13 A. No.

14 Q. I just have a couple of quick questions
15 just to go back to some of what we discussed
16 this morning. You mentioned that
17 Mr. Rothenberger was paid by the mile --

18 A. Yes.

19 Q. -- and sometimes by the hour,
20 correct?

21 A. Yes.

22 Q. How much is he paid per each mile in
23 2006?

24 A. I'd have to go look what his rate
25 was then. I believe now it's 37 cents a mile.

1 M. Kelly

2 Q. And how about per hour?

3 A. \$10.

4 Q. Is that what it is now, \$10?

5 A. I don't know. I'd need to look that
6 up.

7 Q. Do you know if it was less than \$10
8 in 2006?

9 A. I don't think so.

10 Q. Do you know the specific date that
11 Mr. Rothenberger was hired, actually hired by
12 the company?

13 A. I do not know.

14 MR. TUCKER: I'm going to ask you to
15 produce that date and I'll put that request
16 in writing to Mr. Horan --

17 MR. HORAN: Okay.

18 MR. TUCKER: -- so we can just have
19 an answer for the exact date he was hired.

20 MR. HORAN: Sure.

21 MR. TUCKER: We have his
22 application. We just don't know what the
23 date and time was.

24 MR. HORAN: Do you think you have
25 some records at --

1 M. Kelly

2 Q. And where is that physically kept,
3 in your office?

4 A. It's in Ashland, yes.

5 Q. In your office?

6 A. In our office, yes, in Ashland.

7 MR. TUCKER: Give me two minutes,
8 John. I think I'm almost done.

9 MR. HORAN: Okay.

10 (Recess taken.)

11 **BY MR. TUCKER:**

12 Q. Mr. Kelly, do you know what a driver
13 qualification file is?

14 A. Yes.

15 Q. And what is that?

16 A. It's a file that should contain some
17 documents mandated by DOT about the driver.

18 Q. And how did you know that?

19 A. Through research in the last
20 12 months.

21 Q. Did you have a driver qualification
22 file for each of the drivers of T. and B. back
23 in 2006?

24 A. No.

25 Q. Did you have one for Mr. Rothenberger